Prudentdeals Sdn Bhd v YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–2616–10 OF 2011
MOHD HISHAMUDIN, ALIZATUL KHAIR AND MAH WENG KWAI JJCA
19 JANUARY 2015

Land Law — Lease — Mining lease — Power of attorney — Revocable and general power of attorney granted — Recipient of power of attorney could let, sell, lease, subdivide, surrender or amalgamate any of respondent's lands — Second power of attorney entered for mining lease — Whether recipient had power to appoint attorney — Whether acted in excess of powers when granting second power of attorney — Whether clause of second power of attorney could be severed — Whether second power of attorney and agreements binding on respondent

The respondent granted a revocable and general power of attorney ('the first PA') to one Hassan. Pursuant to cl 6 of the first PA, Hassan as attorney could let, sell, lease, subdivide, surrender or amalgamate any of the respondent's lands; and purchase and accept transfer of lands, mines, houses and movable and immovable properties and for that purpose to sign all necessary agreements, transfers and other documents on behalf of the respondent. About nine years later, on an application by Hassan, the State Director of Lands and Mines, Kelantan, granted a ten-year mining lease to the respondent. Some 11 years after the mining lease had been granted to the respondent, Hassan granted a special power of attorney ('the second PA') to one Mustapha to act on behalf of the respondent in matters in respect of the mining lease. Clause 13 of the second PA provided that it was 'irrevocable'. Under the authority of the second PA, Mustapha entered into a memorandum of understanding ('the MOU') with the appellant allowing it to fell and extract timber and to mine for gold on the land comprised in the mining lease ('the said land'). Mustapha then entered into two agreements with the appellant for the extraction of timber and mining on the said land. The State Director of Lands and Mines extended the mining lease for another period of ten years in favour of the respondent and issued the mining certificate. The appellant paid for the cost of survey of the said land, 'prospecting tests', a sum of RM230,000 to Mustapha as consideration for the two agreements, premiums, quit rents and deposit for the mining lease. Before the timber licence could be issued to the respondent, the respondent executed a deed of revocation to revoke the first PA. The appellant was informed of the deed of revocation by an agent of the respondent. Although Hassan was cited as the second party in the deed of revocation, it was not signed by Hassan. Following the revocation of the first PA, the respondent

entered into an agreement with Warisan Tiara (M) Sdn Bhd to extract the timber and to mine the said land. The appellant and the respondent failed to arrive at an amicable settlement herein, resulting in the appellant filing its claim. The appellant prayed for a declaration that the two agreements were valid and binding on the respondent; a declaration that the deed of revocation revoking the first PA was null and void; an injunction to restrain the respondent from allowing any third party to extract the timber and to mine the said land and for damages. Essentially, the appellant claimed that it had the right to fell and extract the timber and to mine the said land by virtue of the second PA granted by Hassan to Mustapha and by virtue of the two agreements entered into between Mustapha and the appellant. The appellant maintained that the revocation of the first PA by the respondent did not invalidate its rights under the two agreements. The High Court held that Hassan had acted in excess of his powers when he granted the second PA to Mustapha to deal with matters in respect of the mining lease since the mining lease was not in existence at the time of the first PA. Consequently, the judge held that the two agreements entered into between Mustapha and the appellant were not binding on the respondent. Hence, the present appeal. The issues that arose for the court's determination were whether Hasan had the power to appoint an attorney; whether Hassan had acted in excess of his powers when granting the second PA; whether cl 13 of the second PA could be severed; and whether the second PA and the two agreements are binding on the respondent.

Held, allowing appeal with costs and remitting case to the High Court for assessment of damages:

(1) Pursuant to cl 19 of the first PA, Hassan was authorised by the respondent to 'substitute and appoint from time to time one or more Attorney or Attorneys with the same and limited powers ...'. At the time of appointment of Mustapha, the first PA had not been revoked by the respondent and was valid. As such, we are of the view that Hassan was lawfully seized with the power to appoint an attorney and was cloaked with the authority of the respondent to do generally what the respondent himself could have done. Hassan had acted within the provisions of cl 19 of the first PA (see paras 22–23).

(2) The first PA must be construed by taking into account the purpose or intention of the respondent when he appointed Hassan as his attorney. The respondent intended Hassan to deal with all his assets both movable and immovable at all material times. The respondent knew or ought to have known that Hassan had applied for the mining lease and that the mining lease would form part of his assets. The respondent was quite prepared to allow Hassan to deal with the mining lease at his discretion without any restriction or prohibition from the time the mining lease was granted till the time Hassan granted the second PA to Mustapha (see para 26).

(3) When Hassan granted the specific and irrevocable second PA to Mustapha, he had in fact and in law acted in excess of his own powers. It is trite that an agent or attorney could not give to a third party a greater power than what has been conferred on him by his principal (see paras 31–32).

(4) The primary purpose of the doctrine of severability is to separate that portion in a document deemed to be void ab initio from the part or portion considered being of a valid nature. However, it is important that with the severance and invalidation of some section or clause in a document, it will not affect the validity of the remaining sections or clauses. Clause 13 of the second PA was not so inextricably mixed up or interwoven that it could not be separated from the rest of the clauses in the second PA. The striking out of clause 13 would not invalidate the second PA in its entirety. Clause 13 was distinct and separate and even after the striking out, what remained in the second PA was in itself a complete PA, without altering its main purpose (see paras 36–39).

(5) The fact that the mining lease was not granted till 10 December 1988 did not invalidate the second PA merely because there was no mining lease to speak of in 1979. The first PA granted to Hassan was in respect of all assets/properties belonging to the respondent. It was not confined to only the assets/properties owned by the respondent as at 19 April 1979. There was no prohibition in the first PA to include any assets/properties acquired by the respondent subsequent to 19 April 1979. In the absence of any express exclusion of any asset/property intended by the respondent, we find no basis to hold that the first PA did not apply to the mining lease. Much like the position of a testator, there was no legal impediment against the acquisition of further property by the testator after the execution of his will. Unless expressly excluded from the list of assets in the will, all properties of the testator will be included in the list up to the date of his death (see para 40(a)).

[Bahasa Malaysia summary

Responden telah memberikan surat kuasa wakil am dan boleh dibatalkan ('SKW pertama') kepada Hassan. Menurut fasal 6 SKW pertama, Hassan sebagai peguam boleh menyewa, menjual, memajak, membahagi, menyerah atau menyatukan tanah-tanah responden; dan membeli dan menerima pindah milik tanah, lombong, rumah dan hartanah boleh alih dan tak boleh alih dan bagi tujuan tersebut untuk menandatangani semua perjanjian, pindah milik dan dokumen lain yang perlu bagi pihak responden. Lebih kurang sembilan tahun kemudian, atas permohonan oleh Hassan, Pengarah Negeri Tanah dan Galian, Kelantan, memberikan pajakan perlombongan selama sepuluh tahun kepada responden. Lebih kurang 11 tahun selepas pajakan perlombongan diberikan kepada responden, Hassan telah memberikan surat wakil kuasa khas ('SWK kedua') kepada seorang Mustapha untuk bertindak bagi pihak

responden dalam perkara berkaitan pajakan perlombongan. Fasal 13 SWK kedua memperuntukkan bahawa ia adalah 'irrevocable'. Di bawah kuasa SKW kedua, Mustapha telah memasuki memorandum persefahaman ('MP') dengan perayu membenarkannya untuk menebang dan mengeluarkan kayu balak dan untuk melombong emas atas tanah itu yang termasuk dalam pajakan perlombongan itu ('tanah tersebut'). Mustapha kemudian telah memasuki dua perjanjian dengan perayu untuk pengeluaran kayu balak dan perlombongan atas tanah tersebut. Pengarah Negeri Tanah dan Galian telah melanjutkan pajakan perlombongan itu untuk tempoh sepuluh tahun lagi yang memihak kepada responden dan mengeluarkan sijil perlombongan. Perayu telah membayar kos kaji selidik tanah tersebut, 'prospecting tests', untuk sejumlah RM230,000 kepada Mustapha sebagai balasan untuk dua perjanjian, premium, cukai tanah dan deposit untuk pajakan perlombongan itu. Sebelum lesen pembalakan boleh dikeluarkan kepada responden, responden telah menandatangani surat pembatalan untuk membatalkan SWK pertama. Perayu telah diberitahu tentang surat pembatalan oleh ejen responden. Walaupun Hassan telah dinamakan sebagai pihak kedua dalam surat pembatalan itu, ia tidak ditandatangani oleh Hassan. Berikutan pembatalan SWK pertama itu, responden telah memasuki perjanjian dengan Warisan Tiara (M) Sdn Bhd untuk mengeluarkan kayu balak dan untuk melombong di tanah tersebut. Perayu dan responden telah gagal untuk mencapai penyelesaian secara baik, yang mengakibatkan perayu memfailkan tuntutannya. Perayu memohon deklarasi bahawa dua perjanjian tersebut adalah sah dan mengikat ke atas responden; deklarasi bahawa surat pembatalan yang membatalkan SWK pertama adalah terbatal dan tidak sah; injunksi untuk menghalang responden daripada membenarkan mana-mana pihak ketiga untuk mengeluarkan kayu balak dan untuk melombong di tanah tersebut dan untuk ganti rugi. Pada dasarnya, perayu mendakwa bahawa ia mempunyai hak untuk menebang dan mengeluarkan kayu balak dan untuk melombong di tanah tersebut menurut SWK kedua yang diberikan oleh Hassan kepada Mustapha dan menurut dua perjanjian yang dimasuki antara Mustapha dan perayu. Perayu menegaskan bahawa pembatalan SWK pertama oleh responden tidak membatalkan haknya di bawah dua perjanjian itu. Mahkamah Tinggi memutuskan bahawa Hassan telah bertindak melebihi kuasanya apabila dia memberikan SWK kedua kepada Mustapha untuk menguruskan perkara berkaitan pajakan perlombongan itu oleh kerana pajakan perlombongan itu tidak wujud pada masa SWK pertama. Berikutan itu, hakim memutuskan bahawa dua perjanjian yang dimasuki antara Mustapha dan perayu tidak mengikat ke atas responden. Justeru, rayuan ini. Isu yang timbul untuk ditentukan mahkamah adalah sama ada Hassan mempunyai kuasa untuk melantik peguam; sama ada Hassan bertindak melebihi kuasanya apabila memberikan SWK kedua; sama ada fasal 13 SWK kedua boleh diasingkan; dan sama ada SWK kedua dan dua perjanjian itu mengikat responden.

Diputuskan, membenarkan rayuan dengan kos dan meremitkan kes kepada

Mahkamah Tinggi untuk taksiran ganti rugi:

(1) Menurut fasal 19 SWK pertama, Hassan diberi kuasa oleh responden untuk 'substitute and appoint from time to time one or more Attorney or Attorneys with the same and limited powers ...'. Pada masa perlantikan Mustapha, SWK pertama tidak dibatalkan oleh responden dan masih sah. Oleh itu, mahkamah berpendapat bahawa Hassan sah mempunyai kuasa untuk melantik peguam dan mempunyai kuasa daripada responden untuk membuat apa yang biasa boleh dilakukan oleh responden sendiri. Hassan telah bertindak dalam skop peruntukan fasal 19 SWK pertama (lihat perenggan 22–23).

(2) SWK pertama hendaklah ditafsirkan dengan mengambil kira tujuan atau niat responden apabila dia melantik Hassan sebagai peguamnya. Responden berniat agar Hassan menguruskan semua asetnya yang boleh alih dan tak boleh alih pada setiap masa matan. Responden mengetahui atau patut pengetahui bahawa Hassan telah memohon untuk pajakan perlombongan dan pajakan perlombongan tersebut adalah sebahagian daripada asetnya. Responden bersedia untuk membenarkan Hassan menguruskan pajakan perlombongan itu atas budi bicaranya tanpa apa-apa sekatan atau halangan dari masa pajakan perlombongan itu diberikan sehingga masa apabila Hassan memberikan SWK kedua kepada Mustapha (lihat perenggan 26).

(3) Apabila Hassan memberikan SWK kedua yang spesifik dan tidak boleh dibatalkan kepada Mustapha, dia telah dari segi fakta dan undang-undang bertindak melebihi kuasanya sendiri. Adalah tidak dipertikaikan bahawa ejen atau peguam tidak boleh memberikan pihak ketiga kuasa melebihi apa yang telah diberikan ke atasnya oleh prinsipalnya (lihat perenggan 31–32).

(4) Tujuan utama doktrin pengasingan adalah untuk mengasingkan bahagian yang terdapat dalam dokumen yang dianggap tidak sah ab initio daripada bahagian yang dianggap sah sifatnya. Walau bagaimanapun, adalah penting dengan adanya pengasingan dan pembatalan beberapa seksyen atau fasal dalam dokumen ia tidak menjejaskan kesahan seksyen atau fasal lain. Fasal 13 SWK kedua tidak bercampur aduk atau berkait sehingga ia tidak boleh diasingkan daripada fasal-fasal lain dalam SWK kedua. Pembatalan fasal 13 tidak akan membatalkan SWK kedua secara keseluruhan. Fasal 13 adalah berbeza dan berasingan malah selepas pembatalan, apa yang kekal dalam SWK kedua dengan sendirinya satu SWK yang lengkap, tanpa mengubah tujuan utamanya (lihat perenggan 36–39).

(5) Fakta bahawa pajakan perlombongan tidak diberikan sehingga 10 Disember 1988 tidak membatalkan SWK kedua hanya kerana tiada pajakan perlombongan yang dikatakan dalam 1979. SWK pertama yang

diberikan kepada Hassan adalah berkaitan semua aset hartanah milik responden. Ia tidak terhad kepada hanya asset/hartanah milik responden sehingga 19 April 1979. Tiada larangan dalam SWK pertama untuk memasukkan apa-apa asset/hartanah yang diperoleh oleh responden selepas 19 April 1979. Tanpa apa-apa pengecualian nyata tentang apa-apa asset/pengecualian yang diniatkan oleh responden, mahkamah mendapati tiada asas untuk memutuskan bahawa SWK pertama tidak terpakai kepada pajakan perlombongan itu. Lebih seperti kedudukan wasiat, tiada halangan undang-undang terhadap pengambilalihan hartanah selainnya oleh pewasiat selepas pelaksaan wasiatnya. Kecuali secara nyata dikecualikan daripada senarai aset dalam wasiat, semua hartanah pewasiat akan termasuk dalam senarai sehingga dia meninggal dunia (lihat perenggan 40(a)).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bank Bumiputra Malaysia Bhd v Henry Ginai anak Langgie [1990] 1 MLJ 296, HC (refd)

Bryant, Powis and Bryant v La Banque du Peuple; Bryant Powis and Bryant v Quebec Bank [1893] AC 170, PC (refd)

Dunkley v Evans [1981] 3 All ER 285, QBD (refd)

CIMB Bank Bhd v Gan Teow Hooi & Ors [2013] 1 MLJ 267, CA (refd)

Non-Metallic Mineral Products Manufacturing Employees Union v Malaya Glass Factory Bhd [1985] 1 MLJ 129, FC (refd)

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535, HL (refd)

SRMM Annamalai Chettiar v Lassam binti Veeramanawi [1953] 1 MLJ 29, CA (refd)

Sekh Abu Bakar Ahmad lwn Sheikh Omar bin Sheikh Abdullah dan satu lagi [1998] MLJU 40; [1998] 3 CLJ 316, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No 22–111 of 2006 (High Court, Kota Bharu)

D Kalai (Kalai & Partners) for the appellant.
Mohd Syukran bin Mohd Noordin (Rosnelim Yusoff & Co) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] On 19 April 1979 the respondent granted a revocable and general power of attorney ('the first PA') to one Hassan bin Othman ('Hassan').

[2] Pursuant to cl 6 of the first PA, Hassan as attorney could let, sell, lease, subdivide, surrender or amalgamate any of the respondent's lands; and pursuant to cl 13, Hassan could 'purchase and accept transfer of lands, mines, houses and movable and immovable properties and for that purpose to sign all necessary agreements, transfers and other documents' on behalf of the respondent.

[3] About nine years later, on 10 December 1988, on an application by Hassan, the State Director of Lands and Mines, Kelantan, granted a ten year 'Pajakan Melombong' ('mining lease') to the respondent.

[4] On 30 November 1999 some 11 years after the mining lease had been granted to the respondent, Hassan granted a special power of attorney ('the second PA') to one Mustapha bin Mohamed ('Mustapha') to act on behalf of the respondent in matters in respect of the mining lease. Clause 13 of the second PA provided that it was 'irrevocable'.

[5] In February 2000 Mustapha under the authority of the second PA entered into a memorandum of understanding ('the MOU') with the appellant allowing it to fell and extract timber and to mine for gold on the land comprised in the mining lease ('the said land').

[6] Following the February 2000 MOU, Mustapha entered into 'two agreements' with the appellant on 10 April 2000 for the extraction of timber and mining on the said land.

[7] On 19 October 2000 the State Director of Lands and Mines extended the mining lease for another period of ten years in favour of the respondent.

[8] On 3 December 2000 the State Director of Lands and Mines issued the mining certificate for the said land to the respondent.

[9] At all material times the appellant paid for the cost of survey of the said land, 'prospecting tests', a sum of RM230,000 to Mustapha as consideration for the two agreements, premiums, quit rents and deposit for the mining lease.

[10] On 8 January 2001 that is, before the timber licence could be issued by the Jabatan Perhutanan Negeri to the respondent on 21 February 2001, the respondent executed a 'deed of revocation' to revoke the first PA. The appellant was informed of the deed of revocation by one Mejar Abdullah, an agent of the respondent on 19 April 2001. Although Hassan was cited as 'the second party' in the deed of revocation, it was not signed by Hassan.

[11] Following the revocation of the first PA, the respondent entered into an agreement with Warisan Tiara (M) Sdn Bhd to extract the timber and to mine the said land.

[12] The appellant and the respondent failed to arrive at an amicable settlement herein, resulting in the appellant filing its claim.

THE APPELLANT'S CLAIM

[13] The appellant in its statement of claim prayed for a declaration that the two agreements dated 10 April 2000 are valid and binding on the respondent; a declaration that the deed of revocation dated 8 January 2001 revoking the first PA was null and void; an injunction to restrain the respondent from allowing any third party to extract the timber and to mine the said land and for damages.

[14] Essentially, the appellant claimed that it had the right to fell and extract the timber and to mine the said land by virtue of the second PA granted by Hassan to Mustapha and by virtue of the two agreements entered into between Mustapha and the appellant.

[15] The appellant maintained that the revocation of the first PA by the respondent did not invalidate its rights under the two agreements.

THE RESPONDENT'S DEFENCE

[16] The respondent's defence was that he had granted the first PA to Hassan to personally deal with his assets/property existing in 1979 and not with the mining lease as the lease was only granted by the State Director of Lands and Mines on 10 December 1988. The respondent denied knowledge of the second PA granted by Hassan to Mustapha, the MOU and the two agreements entered into between Mustapha and the appellant. The respondent also denied knowledge of any payments made by the appellant to secure the grant of the mining lease. It was the respondent's case that he had validly revoked the first PA as Hassan had acted in excess of his powers.

DECISION OF THE HIGH COURT

[17] After a full trial the learned High Court judge held that the appellant had failed to prove its case on a balance of probabilities and dismissed the claim. The main finding in the learned judge's grounds of judgment was that Hassan had acted in excess of his powers when he granted the second PA to Mustapha to deal with matters in respect of the mining lease since the mining lease was not in existence at the time of the first PA. Consequently the learned judge held that the two agreements entered into between Mustapha and the appellant were not binding on the respondent.

THE APPEAL

[18] Being dissatisfied with the decision of the learned judge, the appellant filed its appeal.

OUR DECISION

[19] Upon reading the record of appeal and the written submissions of counsel for the appellant and the respondent and upon hearing the oral submissions of counsel aforesaid, we unanimously decided to allow the appeal with costs and to remit the case to the High Court for the assessment of damages.

GROUNDS OF DECISION

[20] The main issues considered by us before arriving at our decision were, namely:

(1) whether Hassan had the power to appoint an attorney;

(2) whether Hassan had acted in excess of his powers when granting the second PA;

(3) whether cl 13 of the second PA could be severed; and

(4) whether the second PA and the two agreements are binding on the respondent.

Issue 1: whether Hassan had the power to appoint an attorney

[21] It was not in dispute that the respondent had granted a general and revocable power of attorney to Hassan which had been duly registered in the court.

[22] Pursuant to cl 19 of the first PA, Hassan was authorised by the respondent to 'substitute and appoint from time to time one or more Attorney or Attorneys with the same and limited powers ...'. At the time of appointment of Mustapha, the first PA had not been revoked by the respondent and was valid.

[23] As such, we are of the view that Hassan was lawfully seized with the power to appoint an attorney and was cloaked with the authority of the respondent to do generally what the respondent himself could have done. Hassan had acted within the provisions of cl 19 of the first PA.

[24] The court is mindful that a power of attorney is to be construed strictly by the courts according to well recognised rules. The powers of an attorney are interpreted as giving only such authority as they confer expressly or by necessary implication (see *Boustead on Agency* (13th Ed), at p 65). The deed must be construed so as to include all incidental powers necessary for its effective execution (see *Bank Bumiputra Malaysia Bhd v Henry Ginai anak Langgie* [1990] 1 MLJ 296). The power of attorney is not an ambiguous instrument, it is a delegation of all rights, powers and duties, and it requires the formalities before it can be recognised and acted upon.

[25] To determine the powers granted under a power of attorney, the purpose or intention of the donor is relevant to the extent provided for in the deed (see *Sekh Abu Bakar Ahmad lwn Sheikh Omar bin Sheikh Abdullah dan satu lagi* [1998] MLJU 40; [1998] 3 CLJ 316).

[26] In the present case, we are of the view that the first PA must be construed by taking into account the purpose or intention of the respondent when he appointed Hassan as his attorney. The respondent intended Hassan to deal with all his assets both movable and immovable at all material times. The respondent knew or ought to have known that Hassan had applied for the mining lease and that the mining lease would form part of his assets. The respondent was quite prepared to allow Hassan to deal with the mining lease at his discretion without any restriction or prohibition from the time the mining lease was granted on 10 December 1988 till the time Hassan granted the second PA to Mustapha on 30 November 1999.

[27] Thus, whatever acts done by Hassan in accordance with the powers given in the first PA are valid, save for cl 13 which provided that the second PA was irrevocable. For reasons to be discussed later in this judgment we are of the view that cl 13 can be severed from the second PA thereby rendering it revocable and valid in law.

[28] In *SRMM Annamalai Chettiar v Lassam binti Veeramanawi* [1953] 1

MLJ 29, the donee of a power of attorney delegated his power to another who in turn delegated it to a third party. The question there was whether the donor conferred the power to substitute to the donee. The Court of Appeal held that in construing the relevant cl as a whole a power to substitute was conferred on the first donee. In any event, the donor must be taken to have ratified the appointment of the third donee after nearly two years without intervention.

[29] In the present appeal, construing cl 19 of the first PA as a whole, we are of the similar view that it was proper for Hassan to delegate his power to Mustapha (save for the grant of an irrevocable power) and the respondent must be taken to have ratified the appointment of Mustapha as he had not intervened at all for a period of over nine years from 19 April 1979.

Issue 2: whether Hassan had acted in excess of his powers when granting the second PA

[30] The central issue in this case was whether Hassan had acted in excess of his powers when he granted the second PA, which was a specific and irrevocable power of attorney to Mustapha to act on behalf of the respondent in matters in respect of the mining lease, when he himself had only been granted a general and revocable power of attorney by the respondent.

[31] We are of the view that when Hassan granted the specific and irrevocable second power of attorney to Mustapha, he had in fact and in law acted in excess of his own powers.

[32] It is trite that an agent or attorney cannot give to a third party a greater power than what has been conferred on him by his principal. Thus in *Bryant, Powis and Bryant v La Banque du Peuple; Bryant Powis and Bryant v Quebec Bank* [1893] AC 170, Lord Macnaghten had this to say at p 177:

> ... that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

[33] In the present case it is important to remember that pursuant to cl 19 of the first PA, Hassan had the authority to appoint one or more attorneys with only the same or limited powers from time to time. The authority in question was clearly expressed within the four corners of the first PA. Thus Hassan had no authority to grant the irrevocable power to Mustapha.

Issue 3: whether cl 13 of the second PA could be severed

[34] It was argued by counsel for the appellant that in the event it was held that Hassan could not have granted an irrevocable power of attorney to Mustapha, then the court could exercise its discretion and apply the principle of severability of a term in an agreement, and to sever cl 13 which provided that 'And the Donor declares this Power of Attorney to be irrevocable from the date hereof' from the second PA thereby converting it into a revocable power of attorney. We find favour with the submission of counsel and agree that cl 13 can be severed from the second PA to bring it in line with the scope and ambit of the first PA.

[35] The doctrine of severability owes its origin to the law of contracts which has been defined as '... if parts of the contract are held to be illegal or otherwise unenforceable, the reminder of the contract should still apply.'

[36] The primary purpose of the doctrine of severability is to separate that portion in a document deemed to be void ab initio from the part or portion considered being of a valid nature. However, it is important that with the severance and invalidation of some section or cl in a document, it will not affect the validity of the remaining sections or cls. The *Oxford Dictionary* defines severability as '... a provision in a contract, statute or other legal document containing an exemption from one or more of its conditions and provisions' (see also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 on the origin of the doctrine of severability in England).

[37] In the case of *Dunkley v Evans* [1981] 3 All ER 285 (QBD), it was held by Ormrod LJ that where it is possible to sever an invalid part of an order, rule or regulation made in exercise of a power conferred by an Act of Parliament from a valid part of that order, rule or regulation then, unless the invalid part is inextricably interconnected with the valid part, the court is entitled to set aside or disregard the invalid part, leaving the rest intact. In His Lordship's judgment reference was made to one *Halsbury's Laws* (4th Ed), para 26 which sets out the general principle of severability.

[38] In *Non-Metallic Mineral Products Manufacturing Employees Union v Malaya Glass Factory Bhd* [1985] 1 MLJ 129, the Federal Court held that where three of the five disputed items in an Industrial Court award were within the jurisdiction of the Industrial Court it was proper for the Federal Court to sever the remaining two items from the award as the severance would not make what remained of the award unworkable (see also the cases of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *CIMB Bank Bhd v Gan Teow Hooi & Ors* [2013] 1 MLJ 267 (CA) on the application of the principle of severability).

[39] We are of the view that cl 13 of the second PA is not so inextricably mixed up or interwoven that it cannot be separated from the rest of the clauses in the second PA. The striking out of cl 13 would not invalidate the second PA in its entirety. Clause 13 is distinct and separate and even after the striking out, what remains in the second PA is in itself a complete power of attorney, without altering its main purpose.

[40] We are also of the view that while *Dunkley v Evans* case dealt with a statutory instrument, the same principle could, a fortiorari be applied to a contract and to the present case on the validity of the second PA.

Issue 4: whether the second PA and the two agreements are binding on the respondent

(a) A further question that had to be determined by the court under issues 1 and 2 above was whether the second PA granted to Mustapha to conduct the affairs of the respondent in respect of the mining lease was valid on the ground that the mining lease was not in existence as at 19 April 1979 when the respondent granted the first PA to Hassan.

On this point, we are of the view that the fact that the mining lease was not granted till 10 December 1988 did not invalidate the second PA merely because there was no mining lease to speak of in 1979. The first PA granted to Hassan was in respect of all assets/properties belonging to the respondent. It was not confined to only the assets/properties owned by the respondent as at 19 April 1979. There was no prohibition in the first PA to include any assets/properties acquired by the respondent subsequent to 19 April 1979. In the absence of any express exclusion of any asset/property intended by the respondent, we find no basis to hold that the first PA did not apply to the mining lease. Much like the position of a testator, we are of the view that there is no legal impediment against the acquisition of further property by the testator after the execution of his will. Unless expressly excluded from the list of assets in the will, all properties of the testator will be included in the list up to the date of his death.

(b) In view of our findings above we reiterate our decision that the second PA with the severance of cl 13 therein, was validly granted by Hassan to Mustapha and it follows therefore that the two agreements entered into between Mustapha and the appellant are valid and binding.

However, in light of the deed of revocation of the first PA executed by the respondent on 8 January 2001, the second PA and the two agreements would in our view cease to have any further legal effect. Thus the two agreements would only be valid and binding on the respondent up to 8 January 2001 and not thereafter.

Counsel for the appellant had candidly conceded that the first PA had been lawfully revoked. The revocation of the first PA resulted in the termination of the second PA and the two agreements being the consequence of the domino effect on the latter documents. This was necessarily so notwithstanding that the deed of revocation was not signed by Hassan, although he had been cited as the second party in the deed.

(c) In arriving at our decision, we also saw it proper to consider the following issues:

(i) the respondent must have known that Hassan had applied on his behalf for the mining lease in 1988 or just prior to it as the mining lease was issued in the name of the respondent and forwarded to him;

(ii) the respondent must also have known of the extension of the mining lease for another ten years on 19 October 2000 when the respondent was informed of the extension of time by the Pejabat Tanah dan Galian;

(iii) the mining lease was extended on 19 October 2000, that is, just 11 months after Hassan had granted the second PA to Mustapha on 30 November 1999. The circumstantial evidence clearly shows that the respondent knew or ought to have known of the grant of the second PA by Hassan to Mustapha. It was a little too late in the day for the respondent to plead ignorance of the second PA and the two agreements entered into between Mustapha and the appellant; and

(iv) for the respondent to prove that Hassan had acted in excess of his powers and in breach of his duties as an attorney, we are of the view that it was incumbent on the respondent to have called Hassan and/or Mustapha as his witness/es in his defence. We note that neither was called and no explanation was proferred for their absence, thereby attracting the invocation of the principle of adverse inference against the respondent pursuant to s 114(g) of the Evidence Act 1950 .

CONCLUSION

[41] In the result, the appeal was unanimously allowed by the court with costs to the appellant. The case is to be remitted to the High Court for an assessment of damages to be paid by the respondent to the appellant.

Appeal allowed with costs and case remitted to the High Court for assessment of damages.

Reported by Afiq Mohamad Noor